A

T & T GREENVIEW SDN BHD

v.

PENTADBIR TANAH DAERAH JOHOR BAHRU

B

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[ORIGINATING SUMMONS NO: (MT-1) 24-2446-2008]
2 MARCH 2009

C ***LAND LAW:*** *Acquisition of land - Reference to High Court - Objection against award - Objection filed out of time and rejected but referred to court irrespective - Whether decisions of Land Administrator diametrically opposed - Whether reference null and void - Order for mandamus for payment of balance compensation sum withheld - Whether to be allowed*
D *- Land Acquisition Act 1960, ss. 10, 11, 16, 29A, 38 - Specific Relief Act 1950, ss. 44, 45*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Land Administrator - Acquisition of land - Order for mandamus - Application*
E *for mandamus for disbursement of balance compensation sum withheld - Land Administrator referring matter to court despite rejecting Ministry of Education's objection to award - Whether reference null and void - Whether mandamus to issue - Land Acquisition Act 1960, ss. 10, 11, 16, 29A, 38 - Specific Relief Act 1950, ss. 44 and 45*

F This was an application by the plaintiff landowner under ss. 44 and 45 of the Specific Relief Act 1950 ('SRA') for an order of *mandamus* to direct the defendant Land Administrator to disburse to them the sum of RM14,100,000, being the balance 25% of the compensation sum awarded to the plaintiff pursuant to a land
G acquisition exercise conducted by the Land Administrator under the Land Acquisition Act 1960 ('the Act'). The facts showed that the acquisition was made for the Ministry of Education and that the said sum was withheld pursuant to s. 29A(1) of the Act which allowed such withholding pending any objection by the Ministry of
H Education or reference or appeal of the dispute to court. Section 29A(2) of the Act however made it clear that any such objection, *vide* Form N, ought to have been filed within six weeks from the date of service of Form H (the award), namely on or before 23 September 2007. The Ministry of Education however did not
I submit the Form N until 3 March 2008 and nor did it apply for enlargement of time to validate the same. The Land Administrator,

taking cognizance of the late filing, had rejected the Form N, but that notwithstanding, had on 26 June 2008 issued the Form O referring the matter to court. A

The plaintiff argued that it was wrong of the Land Administrator to have referred the matter to court, and that by law he ought to have released the aforesaid sum to them. Hence, the application for *mandamus* herein. The defendant in essence argued that the plaintiff ought to have moved by way of O. 53 Rules of the High Court 1980 ('RHC'), in which case the application was clearly out of time and ought to be dismissed. B C

Held (allowing *mandamus*):

(1) According to s. 29A(2) of the Act, if by the expiry of six weeks from the date of service of Form H on the Ministry of Education no objection is made, the defendant shall pay to the plaintiff the amount withheld. The plaintiff is thus seeking an order to require the defendant to do the very act which is required to be done under s. 29A(2). The relief sought, being in the nature of an order for *mandamus*, falls squarely under s. 44 of the SRA. (para 11) D E

(2) An order for *mandamus* may be granted on an application under O. 53 of the RHC or under s. 44 of the SRA (*Workon Sdn Bhd v. The Director of Lands and Surveys, Sabah*; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Anor Appeal*). In this case the plaintiff's application was made under the procedure set out in s. 45 SRA (ie. founded on an affidavit stating the applicant's right in the matter in question, his demand for justice and the denial thereof). That being so, there is no merit in the defendant's contention that the plaintiff's application is wrong in law. (para 12) F G

(3) The positions taken by the defendant were diametrically opposed. On the one hand the defendant notified the Ministry of Education that its objection is out of time and will not be accepted unless an order for enlargement of time is obtained. On the other hand, the defendant stated that he was only exercising his powers under s. 38(5) of the Act and that the Form N was filed within time. The defendant cannot approbate and reprobate. The defendant is also estopped from denying that the Form N had been filed out of time. In consequence, the alleged land reference in Form O was also H I

made out of time and is contrary to the provisions of ss. 38(3)(a) and 38(4) of the Act and is null and void. (para 14)

(4) In order for *mandamus* to be issued under s. 44 SRA, the plaintiff must satisfy the five cumulative conditions therein, namely that his personal right would be injured if the order is not made, that the making of the payment is incumbent on the defendant in his public character, that the making of the order is consonant with right and justice, that the plaintiff has no other specific or adequate remedy and that the remedy sought is a complete remedy (*Husli bin Mok & Ors v. Probate Officer, Miri*; *Thein Tham Seng v. United States Army medical research Unit and Anor*). On the facts, the plaintiff has evidently satisfied all these provisos. Hence, the court would grant an order in terms of the prayers. (paras 15 & 16)

Case(s) referred to:

Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor [1987] 2 CLJ 36; [1987] CLJ (Rep) 504 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Husli Mok & Ors v. Probate Officer, Miri [1995] 1 LNS 89 HC ***(refd)***

Koon Hoi Chow v. Pertam Singh [1972] 1 LNS 56 HC ***(refd)***

S Singaram v. Fong Peck Moi & Anor [1974] 1 LNS 44 HC ***(refd)***

Thein Tham Seng v. United States Army Medical Research Unit & Anor [1983] 1 MLJ 97 ***(refd)***

Workon Sdn Bhd v. The Director of Lands & Surveys, Sabah & 3 Other Interveners [1999] 1 LNS 31 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25

Evidence Act 1950, s. 115

Federal Constitution, art. 132(1)

Interpretation Acts 1948 and 1967, s. 3

Land Acquisition Act 1960, ss. 10, 11, 16, 29A(1), (2), 38(1), (3)(a), (4), (5), 47

Rules of the High Court 1980, O. 53

Specific Relief Act 1950, ss. 44(1), 45

For the plaintiff - Dr Wong Kim Fatt (KH Choo with him); M/s KH Choo & Co

For the defendant - Jailani Rahman; Asst. Legal Advisor, Johor

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] The originating summons (encl. 2) by the plaintiff is for an order directing the respondent under ss. 44 and 45 of the Specific Relief Act 1950 to pay the sum of RM14,100,000 together with interest to the plaintiff. The plaintiff's application is supported by the affidavit of Mr. Edwin Tan Pei Seng (encl. 3) affirmed on 19 August 2008. In rebuttal, the defendant's affidavit is affirmed by Haji A. Rahim bin Haji Nin (encl. 5) on 17 September 2008.

Brief Account Of The Facts

[2] The subject matter giving rise to these proceedings is a valuable piece of land owned by the plaintiff held under Geran No. 103598 No. Lot 1580 Mukim Tebrau Daerah Johor Bahru Negeri Johor measuring in area 7.2845 hectares or 18.031 acres ('the land'). The Land was acquired by the defendant under the Land Acquisition Act 1960 ('the Act'). On 5 July 2007 the proposed acquisition of the Land under the Act was gazetted in the Warta Kerajaan Negeri Johor. The notice declared that the Land was needed for the following purpose:

> Land Acquisition Under Paragraph 3(1)(a) Of The Land Acquisition Act 1960 [Act 486] For The Purpose Of Sekolah Menengah Kebangsaan Majidi Baru 2 Site, Mukim Tebrau, Johor Bahru District, For Ministry Of Education Malaysia.

[3] On 6 July 2007 the defendant issued a Form E under s. 10 of the Act giving public notice of (i) the commencement of proceedings for the acquisition of the land, and (ii) the date of the enquiry for the hearing of claims for compensation for all interests in the land. On the same date the defendant also served on the plaintiff a Form F under s. 11 of the Act giving notice to require evidence in writing. Subsequently, on 13 August 2007 the defendant issued a Form H under s. 16 of the Act to the plaintiff giving notice of the award and offering compensation in the sum of RM56,400,000 for the land. The plaintiff accepted the defendant's offer on 14 August 2007. On 15 February 2008 the plaintiff received the sum of RM42,300,000 from the Ministry of Education being 75% of the total compensation amount. The balance sum of RM14,100,000 being 25% of the compensation sum was withheld pursuant to s. 29A(1) of the Act.

[4] Meanwhile the Ministry Of Education filed a Form N under s. 38(1) of the Act applying to refer their objection to court. The Form N dated 20 September 2007 together with the RM3,000 deposit were received by the defendant on 3 March 2008. By the defendant's letter to the Ministry Of Education dated 26 March 2008 the defendant rejected the Form N for being out of time. The defendant also advised the Ministry of Education to obtain an order for an enlargement of time from court if it was still interested in pursuing the objection. No order for enlargement of time was obtained by the Ministry Of Education. Notwithstanding the aforesaid, on 26.6.2008 the defendant issued a Form O under s. 38(5) of the Act to the registrar of the Johor Bahru High Court referring the matter to court.

Plaintiff's Submission

[5] Learned counsel for the plaintiff submitted that pursuant to s. 29A(1) of the Act the defendant shall withhold 25% of the amount of the award until the amount of compensation is finally determined either by the court under s. 47 or if there is an appeal. If no objection is made within six weeks from the date of service of Form H, then the defendant shall pay the sum withheld to the plaintiff (s. 29A(2) of the Act). It is contended that the person interested in this case, ie, the Ministry Of Education failed to file the objection in Form N within the period of six weeks prescribed under s. 38(3) of the Act. The deadline for the filing of Form N fell on 23 September 2007. In this case the Form N dated 20 September 2007 was only filed on 3 March 2008. By a letter dated 26 February 2008 to the Ministry Of Education, the defendant referred to a meeting on 5 February 2008 and reminded the Ministry Of Education of the late payment interest at 8%. By a subsequent letter dated 26 March 2008, the defendant stated that the Form N together with the deposit of RM3,000 ought to have been filed within six weeks from the date of the award and no later than 23 September 2007. The defendant stated that they received the Form N together with the deposit on 3 March 2008. The defendant also advised the Ministry Of Education to obtain an order for enlargement of time if it was still interested to pursue its objection. Learned counsel submitted that the defendant was wholly right in law to reject the Form N. The Ministry Of Education until to date has either refused or failed to apply for enlargement of time to file Form N under the express provisions of s. 38(4) of the Act.

[6] It was further submitted that the defendant failed to challenge or contradict the two letters dated 25 April 2008 and 1 August 2008 written by the plaintiff's solicitors to the defendants. In the letter dated 25.4.2008 the plaintiff's solicitors stated, *inter alia*, that as the time period for the filing of the objection had already expired the defendant should release the amount withheld of RM14,100,000 to the plaintiff. In the letter of 1 August 2008 the plaintiff's solicitors reiterated the plaintiff's demand for the RM14,100,000.

Defendant's Submission

[7] At the outset learned counsel for the defendant contended that the plaintiff's application is wrong in law. The application should have been made under O. 53 of the Rules of the High Court 1980 and is accordingly out of time. It was also contended that notwithstanding the defendant's letter of 26.3.2008 the Form N was properly filed by the Ministry Of Education.

[8] Learned counsel also submitted that the Ministry of Education has been denied the opportunity of being heard as it is not a party to the proceedings. As a party affected the Ministry Of Education should have been joined as a party. The defendant was only exercising its powers under s. 38(5) of the Act when it referred the matter to court.

[9] It was further submitted that prior to the filing of the plaintiff's application the High Court had already registered the reference by the defendant *vide* Kes Rujukan Tanah No. MT2-15-26-2008. The pending land reference proceedings in court shows that the withholding of 25% of the compensation under s 29A of the Act is valid. The pending proceedings also preclude the granting of any order for the release of the amount withheld. In the alternative, it was contended that the plaintiff ought to have sought a declaration on the validity of the Form N or Form O in question.

Findings Of The Court

[10] The preliminary issue raised by the defence is that the plaintiff's application is wrong in law. The plaintiff's application for relief is made under s. 44 of the Specific Relief Act 1950 ('SRA'). Section 44(1) of the SRA reads as follows:

44. Power to order public servants and others to do certain specific acts

(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that –

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice:

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

The plaintiff seeks an order compelling the defendant (a public servant) to release the monies withheld pursuant to the mandatory provisions of s. 29A(2) of the Act. At this juncture it is also necessary to reproduce s. 29A(1) and (2) below:

29A Withholding of twenty-five percent of compensation

(1) Where the total amount of any award in respect of any scheduled land exceeds fifteen thousand ringgit, then, notwithstanding section 29, the Land Administrator shall, subject to subsection (2), make payment of only seventy-five percent of the amount of the award, and shall withhold twenty-five percent thereof until the amount of compensation is finally determined either by the Court under section 47 or, if there is an appeal or further appeal pursuant to section 49, on the appeal or further appeal, under the following circumstances –

(a) before the expiry of six weeks from the date of service of Form H on the Government, person or corporation on whose behalf such land was acquired by; or

(b) if before the expiry of the said period such Government, person or corporation has made an objection under section 37 to the amount of compensation or any other objection which may affect such amount.

(2) If within the period specified in subsection (1)(a) no such objection as referred to in paragraph (b) of that subsection is made, then, as soon as may be after the expiry of that period, **the Land Administrator shall make to the person entitled thereto payment of the amount withheld under paragraph (a)** of that subsection. (emphasis added)

[11] According to s. 29A(2) of the Act if by the expiry of the period no objection is made the defendant shall pay to the plaintiff the amount withheld. The plaintiff seeks an order to requiring the defendant to do the very act which is required to be done under s 29A(2). The relief sought falls squarely within s. 44 of the SRA. An order under s. 44 SRA is in its nature an order of mandamus. It is a peremptory order of the court commanding somebody to do that which it is his clear duty to do. The person seeking such an order must have a legal right to the performance of such duty by the person against whom the order is sought (*Koon Hoi Chow v. Pertam Singh* [1972] 1 LNS 56 HC).

[12] Public services include the public services of each State (art. 132(1) Federal Constitution). According to s. 3 of the Interpretation Acts 1948 and 1967, 'public office' means an office in any of the public services. The defendant being the Johor Bahru Land Administrator is therefore a person holding a public office within the meaning of s. 44 SRA. The jurisdiction of the court to issue an order of *mandamus* is pursuant to s. 25 of the Courts of Judicature Act 1964 read with para 1 of the Schedule thereto. A order for *mandamus* may be granted on an application under O. 53 of the Rules of the High Court 1980 or under s. 44 SRA (see *Workon Sdn. Bhd. v. The Director of Lands & Surveys, Sabah & 3 Other Interveners* [1999] 1 LNS 31; *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665 CA). In this case the plaintiff's application has been made under the procedure set out in s. 45 SRA. The application must be founded on an affidavit stating the applicant's right in the matter in question, his demand for justice and the denial thereof. For the foregoing reasons court finds that the defendant's contention is without merit and the court proceeded to hear the application on its merits.

[13] The only issue to be determined is whether the Ministry Of Education's objection was made within the prescribed time. Section 29A(2) stipulates that if within the prescribed six weeks no objection is made, then the defendant shall make payment of the amount withheld to the plaintiff. The facts as adduced by the affidavit evidence plainly shows that (i) the Ministry of Education filed their objection in Form N out of time, and (ii) the Ministry Of Education did not obtain any order for enlargement of time. This is borne by the defendant's letter dated 26 March 2008 to the Ministry Of Education also copied to the plaintiff, the relevant portions which read as follows:

> 2. Dimaklumkan bahawa permohonan tuan/puan untuk meminta pentadbiran ini membuat tindakan merujukan Borang N tindakan permohonan perujukan ke Mahkamah adalah tidak dapat diteruskan kerana ianya bercanggah dengan Seksyen 32 Akta Pengambilan Tanah, 1960 iaitu Borang N berserta wang deposit RM3,000.00 hendaklah dikemukakan dalam tempoh 6 minggu dari tarikh award (42 hari) iaitu selewat-lewatnya pada 23.9.2007.
>
> 3. Untuk makluman, pentadbiran ini hanya menerima Borang N berserta wang deposit RM3,000.00 pada 3.3.2008 sebagaimana resit bayaran bernombor J 487382 bertarikh 3.3.2008.
>
> 4. Sekiranya pihak Kementerian Pelajaran Malaysia masih berminat untuk meneruskan bantahan melalui Borang N, pihak tuan/puan adalah dinasihatkan untuk mendapatkan 'Perintah Pelanjutan Masa' dari Mahkamah terlebih dahulu.

[14] The defendant admitted to issuing the aforesaid letter. At the hearing of this application, however, the defendant says that when the said letter was issued it did not refer the matter to the office of the State Legal Adviser. Having rightly rejected the Ministry Of Education's objection in Form N for being out of time, and having cognizance of the fact that no order for enlargement of time has been granted, the defendant took the unusual step of filing the Form O at the High Court. On this premise the defendant has refused to make payment of the amount withheld to the plaintiff. The court finds that the positions taken by the defendant are diametrically opposed. On the one hand the defendant notifies the Ministry Of Education that its objection is out of time and will not be accepted unless an order for enlargement of time is obtained. On the other hand, the defendant now states that it was only exercising its powers under s. 38(5) of the Act and that the Form

N was filed within time. With respect, the defendant cannot approbate and reprobate at the same time. The defendant is also estopped from denying that the Form N was filed out of time (s. 115 Evidence Act 1950). In consequence the alleged land reference in Form O was also made out of time and is contrary to the provisions of ss. 38(3)(a) and 38(4) of the Act and is null and void (*Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor* [1988] 2 MLJ 604; *S. Singaram v Fong Peck Moi & Anor* [1974] 1 LNS 144).

[15] In order for the issue for an order under s. 44 SRA or a *mandamus* the plaintiff must satisfy the five cumulative conditions (see *Husli bin Mok & 3 Ors v. Probate Officer, Miri* [1995] 1 LNS 89 HC; *Thein Tham Seng v. United States Army Medical Research Unit & Anor* [1983] 1 MLJ 97). Under proviso (a) of s. 44 SRA, the plaintiff must show that its personal right would be injured if the order is not made. The first condition is satisfied as the plaintiff's entitlement to the amount withheld would be wrongly denied if the order is not made by the court. As to proviso (b), the plaintiff must show that the making of payment is incumbent on the defendant in his public character. In this case the obligation imposed on the defendant is of a public character, being an act required to be performed under s. 29A(2) of the Act. As *mandamus*, is a discretionary remedy, proviso (d) requires the plaintiff to show that it has no other specific or adequate remedy. There is, as submitted by learned counsel for the plaintiff, no other legal remedy available to the plaintiff. In withholding the amount the defendant purports to exercise its powers under the Act when clearly there are no grounds for doing so. In the premises, the remedy sought will be complete (e) as it requires the defendant to perform its duty under the express provisions of s. 29A(2) of the Act. The court is also of the view that on the undisputed facts and the clear provisions of the Act the making of the order of *mandamus* is consonant to right and justice.

[16] For the foregoing reasons the court granted an order in terms of prayers (1), (2), (3) and (4) of the plaintiff's application.